

**IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY**

CIV-2009-485-002070

IN THE MATTER OF the Judicature Amendment Act 1972

AND

IN THE MATTER OF the Weathertight Homes Resolution
Services Act 2006

BETWEEN HAYIM NACHUM
Plaintiff

AND WEATHERTIGHT HOMES TRIBUNAL
First Defendant

AND ALISON MARGARET HEARN,
MURRAY DEANS AND HARTHAM
TRUSTEES LIMITED AS TRUSTEES OF
THE A HEARN FAMILY TRUST
Second Defendants

AND EMPA GROUP CONSULTANTS
LIMITED
Third Defendant

AND WELLINGTON CITY COUNCIL, RAJU
MORAR, NEESHA MORAR,
ISHWERAL MORAR, MARK ANDREW
DEBNEY, BARRY STUART MILLAGE,
BARRY MILLAGE ARCHITECTS
LIMITED AND THE SMALL BUILDING
COMPANY LIMITED
Fourth to Ninth Defendants

BETWEEN MARK ANDREW DEBNEY
First Appellant

AND THE SMALL BUILDING COMPANY
LIMITED (FORMERLY NAMED
WADESTOWN DEVELOPMENTS
LIMITED)
Second Appellant

AND ALISON MARGARET HEARN,
MURRAY DEANS AND HARTHAM
TRUSTEES LIMITED AS TRUSTEES OF
THE A HEARN FAMILY TRUST
First Respondents

AND WOODWARD SHELF CO NO. LIMITED
(IN LIQUIDATION)
Second Respondent

AND EMPA GROUP CONSULTANTS
LIMITED
Third Respondent

AND WELLINGTON CITY COUNCIL
Fourth Respondent

AND RAJU MORAR, NEESHA MORAR AND
ISHWAREL MORAR AS TRUSTEES OF
THE I & R MORAR FAMILY TRUST
Fifth Respondents

AND TONG LIU & WEN TENG (REMOVED)
Sixth Respondents

AND BARRY STUART MILLAGE
Seventh Respondent

AND BARRY MILLAGE ARCHITECTS
LIMITED
Eighth Respondent

AND HAYIM NACHUM
Ninth Respondent

Hearing: 11 February 2010

Counsel: Mr B W F Brown QC and M R Sherwood King for Hearn Family Trust
Mr G M Illingworth QC for Wellington City Council
Mr J W Tizard for M A Debney and The Small Building Company Ltd
J A L Oliver for Tribunal
A S McIntyre for Hayim Nachum

Judgment: 18 February 2010

In accordance with r 11.5 I direct the Registrar to endorse this judgment with the delivery time of 3.15pm on the 18th day of February 2010.

RESERVED JUDGMENT OF GENDALL J

[1] The Trustees of the A Hearn Family Trust are the present owners of a property at 2C Lytton Street, Wadestown. It was badly built and faults have resulted in it being a leaky home. They successfully brought a claim in the Weathertight Homes Tribunal against Mr Debney and Wadestown Developments Ltd – now The Small Building Company Ltd; the previous owners of the dwelling; and the Wellington City Council.

[2] For ease of reference the various parties are described in the decision as follows:

| | |
|--------------------------|---|
| <i>“Claimant owners”</i> | Trustees of the A Hearn Family Trust |
| <i>“Engineers”</i> | EMPA Group Consultants Ltd |
| <i>“Council”</i> | Wellington City Council |
| <i>“Tribunal”</i> | Weathertight Homes Tribunal |
| <i>“Developer”</i> | Woodward Shelf Co. No. 1 Ltd (in Liquidation) originally |

| | |
|---|--|
| | Parklane Investments Ltd (in liquidation) |
| <i>“Hayim Nachum”</i> | Parklane’s sole director |
| <i>“Previous owners of the dwelling”</i> | L & R Morar Family Trust |
| <i>“Builder”</i> | Wadestown Developments Ltd |
| <i>“M A Debney”</i> | Director of Wadestown Developments Ltd |
| <i>“Architects”</i> | Barry Millage Architects Ltd and B S Millage |
| <i>“Agents of the Developer”</i> who applied for Building consent | Tong Liu and Wen Teng (Removed from proceedings) |

[3] The Claimant Owners did not seek to join any parties other than the Developer, the previous owners of the dwelling and the Council. The Council joined the Engineers and Hayim Nachum. The Builder and Mr Debney were joined on the application of the Developer.

[4] No finding of liability was made against the Engineers and Architects.

[5] Hayim Nachum only became joined in the proceedings on the application of the Council, when the Developer was removed as a party because it went into liquidation. Mr Nachum declined to appear or take any part initially in the determination of the claim.

The appeal

[6] In a decision delivered on 30 April 2009, the Tribunal found in favour of the Claimant Owners against the Council, Mr Debney and his company Wadestown Developments as Builder, as negligent. Those parties were held accordingly jointly and severally liable to the Claimant Owners. The Tribunal fixed damages in the sum of \$459,807. The previous owners of the dwelling were found to be in breach of contract to the Claimant Owners, and liable to the extent of \$10,000 to be deducted

from the original damages figure of \$459,807. The Engineers were found not negligent or otherwise liable; the Developer (being in liquidation) could not be the subject of an order; the Tribunal then joined its director Hayim Nachum on the application of the Council. The Architects were dismissed from the proceedings as were the Agents of the Developer.

[7] The Tribunal then dealt with contribution issues as between the Council and Builder. Obviously, the claim for contribution sought against Mr Nachum by the Council and the Builder had not then been heard. It was to come later.

[8] The Tribunal assessed the Council's contribution at 30 per cent, Mr Delaney and the Builder company at 70 per cent. The Council was entitled to a contribution to that extent from Mr Debney and the Builder company, and they in turn were entitled to a contribution of 30 per cent from the Council for the amount that they were jointly liable. But both interests were liable to the Claimant Owners for the "full" amount.

[9] Mr Nachum declined to be involved in any way in the substantive hearing and adjudication. The claim that he faced, from the Council and the Builder for contribution or indemnity, was on the basis that he had total and effective control of the building project. That matter was to be later determined. Mr Nachum, through his counsel, then made legal submissions challenging the ability of the Tribunal to consider the contribution claims against him. His application was denied by the Tribunal, and he then declined or refused to take the opportunity of being further heard. The Claimant Owners were not parties to those applications nor pursued any claim when the contribution liability of Mr Nachum was decided. The Tribunal found him to be jointly and severally liable for the same amount as determined against the Council and the Builder, and ruled that both those parties were entitled to recover amounts to reflect the degree of Mr Nachum's contributory negligence.

[10] The determination of the Tribunal dated 21 September 2009 made it clear that findings as to liability and quantum made on 30 April 2009 were not in issue, and the only matter for later determination was the contribution claim by the Council and the Builder against Mr Nachum.

[11] The proceedings in this Court involved two matters:

- (1) First, an appeal by the Builder against the Tribunal's determination dated 30 April 2009 in which Mr Debney and the Builder company's liability, and quantum were fixed. Allied to this appeal is an "appeal" by the Council against the determination made in favour of the Claimant Owners, and also a "cross-appeal" against the percentage of contribution the Tribunal fixed on the part of the Builder.
- (2) Secondly, judicial review proceedings are brought by Hayim Nachum against the Tribunal, the Claimant Owners and others, which challenge the lawfulness of the Tribunal's determination dated 21 September 2009.

Preliminary matters

[12] The merits of the appeals, and cross-appeal, and the judicial review proceedings remain to be heard. The Court has been asked to consider two preliminary matters, the outcome of which some may determine future progress (if any). These are:

- (1) The original Claimant Owners apply to strike out the appeals of the Council and Builder against the decision of the Tribunal dated 30 April 2009, on the grounds that these appeals were filed out of time. The Claimant Owners say that the Court should not exercise its discretion to extend the time period but no formal applications for such extension have been filed. Depending on the outcome of this appeal, it is agreed that such can follow if necessary.
- (2) Separately, the Council's appeal contained the ground, presented late in the original proceedings (and clearly as an afterthought), to the effect that the Tribunal did not have jurisdiction to deliver any determination in favour of the Claimant Owners. That is because the previous owners of the dwelling, the Morar Family Trust, had

obtained an assessor's report and did not pursue any claim before disposing of the property to the Claimant Owners. It was contended that s 33 of the Weathertight Homes Resolution Services Act 2006 (the 2006 Act) prevents the Claimant Owners as present owners, from requesting a second assessor's report to the Tribunal. Therefore, it is said that the claim was barred by s 33 of the 2006 Act and the Tribunal lacked jurisdiction to proceed. That argument was rejected by the Tribunal. When the matter was heard by this Court, the Council did not actively pursue its argument. It simply "abided" the Court's decision. But Mr Tizard, on behalf of the Builder, pursued the point and presented detailed argument in support of it.

The jurisdiction issue – s 33

[13] I deal with this issue first because if it succeeds it would follow that the Tribunal had no power to consider any claim by the Claimant Owners, and the entire proceedings have been a nullity.

Sections 32 and 33 Weathertight Homes Resolution Services Act 2006

[14] If an owner of a leaky home wishes to bring or initiate a claim under the 2006 Act an application has to be made to the Chief Executive to have an assessor's report prepared in respect of it under s 32. If the information indicates that the claim is capable of meeting the required criteria, the Chief Executive arranges for an assessor's report. The claim then proceeds and is assessed and evaluated on the basis of that report.

[15] Section 32 provides, relevantly:

32 Application for assessor's report

- (1) An owner of a dwellinghouse who wishes to bring a claim in respect of it may apply to the chief executive—
 - (a) to have an assessor's report prepared in respect of it; or

- (b) to have an assessor's report that was prepared in respect of it on the application of a former owner approved as suitable for the owner's claim.
- (2) On receiving an application ... that complies with all applicable requirements ... the chief executive must make an initial assessment as to whether the information in the application indicates that the claim meets or is capable of meeting the eligibility criteria.
- (3) If the chief executive considers that the information does indicate that the claim meets or is capable of meeting those criteria, the chief executive must arrange for an assessor's report to be prepared on the claim.
- (4) If the chief executive does not consider that the information indicates that the claim meets or is capable of meeting those criteria, the chief executive must—
 - (a) decline to arrange for an assessor's report to be prepared; and
 - (b) advise the claimant of that decision and the reasons for it.

[16] Section 33 restricts a claim under s 32(1)(a), and an application for an assessor's report, in certain circumstances. It provides:

33 Restriction if assessor's report prepared for claim brought in respect of dwellinghouse by former owner

- (1) An owner of a dwellinghouse in respect of which an assessor's report has already been prepared in relation to a claim brought in respect of the dwellinghouse by a former owner must not apply to the chief executive under s 32(1)(a) unless—
 - (a) the owner or some former owner has applied to the chief executive under s 32(1)(b); and
 - (b) the chief executive has refused to approve the assessor's report already prepared as suitable for the owner's or former owner's claim.
- (2) This section overrides s 32(1)(a).

[17] The Builder contends that s 33 applies to the present case so that any claim by the Claimant Owners is barred.

The present case

[18] Three months after the conclusion of the Tribunal's adjudication upon the Claimant Owners' claim, and after submissions had been filed but before the

determination was made, the Council advanced the argument that the assessor's report which was obtained by the Chief Executive on the Claimant Owners' application, (the "Phayer Report") was ultra vires. If so, it followed that the consideration and determination of the Tribunal of the claim was also ultra vires its power. The Tribunal dealt with and rejected that argument.

[19] The argument is based upon the fact that the previous owners of the dwelling had themselves sought an assessor's report from the Chief Executive. That had been obtained (the "White Report"), but they withdrew their claim before they sold the property to the current Claimant Owners. The grounds contained in the Council's appeal (now adopted by the Builder) was that that claim having not been obtained on the application of the former owners, the subsequent report (the Phayer Report) could not be commissioned by the Chief Executive. So there could not be initiation of a claim under the 2006 Act for the purposes of s 32(1)(a).

[20] If this argument is correct all parties have wasted considerable expense for nothing. Mr Tizard asserts that the issue of jurisdiction is fundamental to the powers of the Tribunal to hear an application and to make orders against his clients. He is correct. But his argument is flawed and fails.

[21] The claim before the Tribunal was not brought under the 2006 Act, which came into force on 1 May 2007. The claim was brought on 16 March 2007 under the earlier Weathertight Homes Resolution Services Act 2002 (the 2002 Act). The 2002 Act did not have the equivalent s 32(1)(b) in respect of a former owner's application being approved as suitable for the present owners' claim. The earlier White Report prepared for the previous owners could not, at the time this application was brought, have been approved for this claim and s 33 of the 2006 Act does not apply. Further, the transitional provisions of the 2006 Act require the claim to be treated under Subpart 3 of Part 2 of the 2006 Act and under the transitional periods the claim met the eligibility criteria for the determination of the claim and the Tribunal was required to initiate adjudication pursuant to s 62 with the transitional provisions (see s 130) applying as if the claim was one brought under the 2006 Act.

[22] Mr Tizard's argument that s 33 required the present owners, in order to maintain a claim, to apply under s 32(1)(b) and for the Chief Executive to refuse to approve the earlier report as suitable for the claim. This cannot bear scrutiny. Having properly brought a claim under the 2002 Act, the owners could not then have applied to the Chief Executive for approval under a provision that was not in force. They could not anticipate legislation (ss 32(1)(b) and 33) that did not exist.

[23] The jurisdiction argument does not commend itself to the Court and is rejected.

The strike-out applications of the owners

[24] I turn to deal with the application to strike out the appeals of the Builder and Council.

[25] The appeal of Mr Debney was filed on 19 October 2009, and generally challenges all findings made against him by the Tribunal. The appeal and cross-appeal of the Council was filed on 2 November 2009. It challenges the Tribunal's finding that the claim was not barred by s 33 of the 2006 Act, and to the contribution findings made on the part of the Builder and Developer (asserting it should be at least 85 per cent, rather than 70 per cent). It does not challenge the finding of the liability but challenges the finding that there was no contributory negligence on the part of the Claimant Owners.

[26] I apprehend that the Council's "cross-appeal", concerning the percentage of contribution between it and the Builder, is not something that the Claimant Owners contend ought not proceed. It does not concern them. But I heard no argument specifically on that. The Builder's appeal concerns liability to the owners and quantum, and apportionment between it and Mr Nachum.

[27] The Claimant Owners contend that both notices of appeal should be struck out, being filed beyond the 20 working day time limit. This expired on 28 May 2009 in respect of the Tribunal's determination of 30 April 2009 made in favour of the

Claimants. It expired on 19 October 2009 in respect of its determination of 21 September 2009.

[28] Both the Council and the Builder contend that time for the purpose of lodging an appeal did not commence to run until the Tribunal had delivered its “final determination” on 21 September 2009. The “cross-appeal and appeal” by the Council was not filed until 4 November 2009, being outside that period in any event.

[29] The issue for consideration is whether what the Tribunal described as the “interim” determination fixes the date from which time commenced to run as against the present appellants, in relation to their liability to the Claimant Owners. The issue of respective contributions was fixed in the initial determination, and apparently confirmed in the later determination, it is said, is a matter between those parties. The Council may face a claim that it is out of time for any appeal as it relates to the Builder, but that has not been argued at this point. The sole issue is whether the Claimant Owners are correct in their argument that both appeals, against findings as they relate to them, ought to be struck out as out of time.

Contentions for owners

[30] Mr Brown QC contended, what is well known, that generally time runs from the final determination of a matter. The content of the determination of the Tribunal dated 30 April 2009, although called an “interim” determination, makes it clear that in fact it is a final determination of the rights and claim of the owners. He referred to a number of authorities well-known to the Court, such as *Opotiki Packing & Coolstorage Ltd v Opotiki Fruitgrowers Co-operative Ltd (In Receivership)* [2003] 1 NZLR 205 (HC), 215 (CA); *Iluka Midwest Ltd v Technological Resources Pty Ltd* [2002] FCA 49; *Rosser v Global Construction Services Ltd* HC Auckland CIV-2004-404-2564, 10 August 2004. All of these decisions support the proposition that awards or decisions towards decisions or determinations must speak for themselves. On an objective appraisal of the determination on its face, if a decision purports to finally decide questions of liability and quantum as between a claimant/plaintiff and a respondent/defendant, then it is a final determination.

[31] Mr Brown QC submitted that although the authorities relate to arbitrations and different types of proceedings, there is no reason for them to be distinguished when determining whether an adjudication or determination is final as between the competing parties. He emphasised that the determination was called “interim” (although suggested that it was not necessary for such a description to be given) only because the extent of Mr Nachum’s contribution or liability had not been heard. But that did not bear on any aspects of the Claimant Owners’ entitlement as against the present appellants and arose only because it was the Council who sought to join Mr Nachum as requiring contribution.

Appellants’ contentions

[32] The arguments of Mr Illingworth QC and Mr Tizard, in summary, are that a *generalised* reference to approaches adopted in other cases is misguided, because appeal rights arise only pursuant to the operating statute relevant to the subject matter. In terms of applications and proceedings under the 2006 Act, those rights arise only under s 93, which provides:

93 Right of appeal

- (1) A party to a claim that has been determined by the tribunal may appeal on a question of law or fact that arises from the determination.

...

[33] Mr Illingworth QC’s primary argument was that “claim” in s 93 meant a claim by an owner of a dwellinghouse that the owner believes suffered damage through penetration of water. That is a “leaky home” claim relating to a dwellinghouse. It does not arise by an owner suing any particular person, but rather by the lodging of a claim under s 9. This is an application for an assessor’s report which then becomes an eligible claim under s 10 if the Chief Executive decides it meets the eligibility criteria. The claim in respect of the dwellinghouse then proceeds to adjudication. It involves not only the owners, but any party who may be the subject of inquiry and assessment as to their responsibility, if any, for damage. Because, in counsel’s argument, Parliament has used the word “claim” consistently throughout the statute, it can only have been, as a matter of proper statutory

construction, that it is used in the context of a claim as a whole in respect of the home. It does not have two or more individual components. It is a unitary concept covering the entire proceedings. The whole scheme of the statute being aimed to resolve the *entire* claim, and counsel argued that the authorities upon which Mr Brown QC relies were distinguishable. They do not apply in a case such as this which is dependent on a particular statutory provision.

[34] The appellants contend that if there were to be piecemeal appeal rights it would not advance the speedy, flexible and cost-effective procedures and purposes contained in s 3 of the 2006 Act. Counsel argued that Parliament had intended that it provide for appeal rights for, as he put it, “interim decisions” before final disposal of the claim as a whole, it would have said so.

[35] Accordingly, counsel submitted that time did not commence to run until the claim in respect of the dwellinghouse was finally determined and disposed of by the determination made on 21 September 2009 in relation to the liability and contribution of Mr Nachum.

Discussion

[36] It is obvious that the critical question is whether the determination of 30 April 2009 finally determined a claim on a proper interpretation of s 93. I do not accept that the description by the Tribunal that its findings in its determination was an “interim” determination is of great moment. The real issue is whether the determination was a final decision deciding the rights of the owners and other parties, leaving aside Mr Nachum who had declined to participate and his degree of liability/contribution was not then able to be determined.

[37] It is clear that, although at times counsel referred to the determination as an interim “adjudication”, it is clearly a determination once and for all of the rights and entitlements of the Claimant Owners and the liabilities of the Council and Builder to them, and also formal exoneration of the Engineers ([124] – [129]) and the Architects ([26]).

[38] Mr Illingworth QC placed particular focus to the word “claim” in s 93(1) as support for his view that it could only mean the overall unitary claim in relation to the dwellinghouse. It could not relate to individual “claims” pursued by one or more parties who were involved in the adjudication and determination.

[39] All the words of s 93 have to be considered, as does the statutory context as a whole, in interpreting the provision under consideration. In s 93(1) there are other important words, namely “the determination” and “a party”. Whilst a determination may be said in some circumstances to be the making of a finding, it is, in the context of claims involving one or more parties, the act of making a decision. Something is “determined” when it is formally decided between two or more parties, where there has been a contest. Clearly, the adjudication is a contest where the owners essentially contend that they had a leaky home and certain persons or bodies were responsible for that. Where they succeed in respect of some of the parties and failed in respect of others, the decision as between them and others is a determination.

[40] For something to be “determined” by a person or Tribunal it occurs when they settle a question conclusively and make a decision. In this case, Mr Brown QC’s argument is that the determination in April settled the question of the Claimant Owners’ entitlement to damages, and the quantum, which was to be paid jointly and severally by the Council and the Builder. I add that it also settled the absence of liability to the Claimant Owners on the part of the Engineers and Architects. Questions of costs obviously remain to be determined as to the contribution of Mr Nachum, who it was that the Council contended should contribute and obviously required separate consideration. The question is whether that could have possibly altered the finality of the determination in favour of the owners as against the Council and Builder.

[41] The phrase “*party to a claim*”, in s 93, envisages a separate individual, whether complainants or those who may have liability imposed upon them. Mr Illingworth QC did not dwell upon this, but the definition of “parties” in s 8 is “in relation to a claim, means the claimant and any 1 or more respondents in relation to that claim.”

A respondent is “a person against whom a claim is made.”

[42] This clearly envisages that the owner brings the claim and a respondent is a party to it once it is suitable for, and subject to, the adjudication and the determination by the Tribunal. It no longer is some generalised claim in respect of a leaky home with appeal rights of any of the “parties” not arising until after a determination which settles all the individual rights and liabilities of the constituent parties to a claim.

[43] In this case all that remained for determination was contribution between the Builder, the Council and Mr Nachum towards their liability to the Claimant Owners, having already been established as joint and several, with rights of contributions inter se.

[44] It is clear from other provisions in the 2006 Act that there can be claims in the District Court or High Court, where a lis or dispute exists between an owner and other parties brought in respect of a leaky home. These may be transferred to the Tribunal for its adjudication. They must be claims involving plaintiff and defendant, and not generalised claims in respect of a leaky home without identified parties.

[45] So too, a party to a claim will include the owners/claimants, who may appeal from a determination that finally determines a question excusing the liability of another. For example, in this case, the Architects and Engineers. Those two parties cannot be left for many months to ponder whether an appeal would be brought against the decision that found in their favour, if time for appealing does not run until other matters affecting other parties were finally resolved. That ought surely not be the case.

[46] A claim is the claim “by the owner”, and any party to that claim (including the owner whose rights have been finally determined by the Tribunal) may appeal if a question of law or fact arises from that determination if it is final. Whether or not the legal status of the determination settles the issue as a final decision or determination affecting a party, remains an objective appraisal of the document on its face and the dicta in *Opotiki Packing & Coolstorage Ltd* applies.

[47] Here, the determination, even though called “interim”, determined the liability and quantum of both the Builder and the Council as well as exonerating the Engineers and Architects. That the Builder and Council might obtain contribution from Mr Nachum later did not affect their joint and several liability of \$449,807 finally fixed by the determination. The Tribunal made it quite clear that the Council and the Builder were parties to the claim and they sought to pursue a claim against Mr Nachum. The Tribunal made it clear that, as it had earlier said in its first determination:

1. On 30 April 2009, I decided that the Wellington City Council, Mark Andrew Debney and Wadestown Developments Ltd were jointly and severally liable to the complainants for the sum of \$449,807.
2. Those parties were invited to provide particulars of *their claim against the tenth respondent, Mr Hayim Nachum, for a contribution.*

(emphasis added)

Just as they were parties to the initial claim, so too, were the Claimant Owners – as well as the Engineers, Architects and for that matter, as it developed based upon the Council’s application, Mr Nachum.

[48] It is implicit in the scheme of the 2006 Act, in terms of s 3, owners of dwellinghouses that are leaky buildings are to be provided with “access to speedy, flexible, and cost-effective procedures for assessment and resolution of claims relating to those buildings”, and I do not accept that a party (for example Mr Nachum) could prolong the final determination of the rights of an owner by adopting procedural stances for many months.

[49] Expeditious disposal of the proceedings is envisaged and, for example, in cl 20 of Schedule 3, Part 2 entitles any party to any proceedings to apply to the Tribunal to accord urgency to the hearing of the claim and if the Tribunal is satisfied that it is necessary and just to do so, then it shall order the proceedings to be heard as soon as practicable.

[50] I agree that piecemeal appeal rights do not follow from the provisions of the statute, or advance speedy resolution of a claim initiated by an owner, but the finding that is the subject of the appeal was clearly a final determination of the rights of the

owners in the contest between it and the other parties and it also finally determined the rights or exoneration of the Architects and Engineers. The Tribunal could not have revisited its determination made in favour of the complainants, or those respondents as to liability and quantum later. As was the case in *Rosser v Global Construction Services Ltd* where the “interim” award dealt with owner’s liability finally when time ran from that determination. The dicta of Merkel J in the High Court of Victoria in *Iluka Midwest Ltd v Technological Resources Pty Ltd* at [45] is apt:

... to the extent that those issues have been determined by an interim decision in the manner that is unfavourable to the interests of either party, it is incumbent upon that party, if it so desires, to appeal the decision. If it fails to do so then it is not open to that party to appeal whether directly or indirectly, against the decision of the Commissioner out of time without leave of the Court.

[51] I am satisfied by a wide margin that the determination of the Tribunal dated 30 April 2009 finally determined the rights of the Claimant Owners as a party to a claim, as well as the final exoneration of the Architects and Engineers. It also finally determined the liabilities and responsibilities of the Council and Builder as parties to a claim being “any one or more respondents in relation to that claim” vis-a-vis the Claimant Owners. Their entitlements to contribution from Mr Nachum or their respective contributions as between each other may not have been finally determined, but that was irrelevant to the final determination of their liability to the Claimant Owners. The appeals brought by each of them against the determination of 30 April 2009 are substantially out of time and are struck out.

[52] Where the appeal of the Builder relates to challenge to the ultimate determination of the contribution of Mr Nachum to the amounts the Builder is liable to the owners, it was filed within the 20 working days of the determination of 21 September 2009. But in other respects the appeals against orders in favour of the owners contained in paras A-F, are struck out.

[53] In respect of the “cross-appeal” and appeal by the Council it is struck out in its entirety. Ground A (the s 33 argument) is disposed of in this judgment. Grounds B and C are relating to the decision of 30 April 2009 are out of time, and struck out. I am conscious that the Council seek to contend that the determination of

21 September 2009 dealt with the degree of contribution of the Builder and Developer and refers (at [131]) to the “final determination”. Even if that is correct and time ran against the Council from 21 September 2009, it still remains out of time in filing that appeal. The point however seems to be that that determination did not deal with the respective contributions of Builder and Council as between themselves, the Tribunal stating that it had already dealt in its previous decision of the extent of the Council’s liability, saw no need to adjust it. The determination of 21 September 2009 on its face clearly relates solely to the claims by the Builder and Council as to the amounts they are entitled to recover from Mr Nachum by way of his contribution to them.

[54] The Council’s “cross-appeal” (point B) challenges its contribution fixed vis-a-vis the Builder. It is not subject to a strike-out application by that party – the only party affected by it. But it is out of time by a lesser extent. No order can be made at present in respect of that.

[55] Both appeals are struck out to the extent that I have referred.

[56] It is agreed that applications for extension of time may be made. Whether such applications will be granted will depend on factors that I need not discuss in this decision. If either the intended first and second appellant (the Builder or the Council) wish to apply for an extension of time for filing a Notice of Appeal (under s 94(2)(b)) in relation to the determination of 30 April 2009 (or if the Council further wishes to apply for an extension of time to appeal against the determination of 19 October 2009) then I fix the following timetable directions:

- (1) such applications together with supporting affidavits are to be filed within 21 days of the date of this decision;
- (2) any respondents to such applications may file Notices of Opposition and supporting affidavits within a further 21 days;
- (3) thereafter, those applications are to be allocated a hearing in this Court on an urgent basis; and

- (4) leave is granted to the parties to apply to an Associate Judge to vary these timetable requirements by consent if necessary.

[57] I record that counsel for Mr Hayim Nachum did not seek to be heard in these applications and simply maintained a watching brief.

Costs

[58] The Claimant Owners have succeeded in respect of the s 33 jurisdiction argument and are entitled to costs on that. It was an argument devoid of merit and had been disposed of by the Tribunal. Whilst not pursued by the Council it was not formally abandoned as a second ground of appeal. It was actively pursued on behalf of the Builder. This is a case where reasonable solicitor/client/counsel costs and disbursements ought to be paid to the First Respondents in the appeal, in respect of the dismissal of that ground. Counsel may submit memoranda as to the quantum of such award and whether the appellants are jointly/severally liable for such award, and if several in what percentage.

[59] In respect of the successful application to strike out the appeals, costs should follow that event. The First Respondents are entitled to these against both parties jointly, on a Category 2B basis. Again, if agreement cannot be reached as to quantum the parties may file memoranda.

J W Gendall J

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